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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-6859

RONALD DERAY SKIPPER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 14th DAY OF June, 1985.

Harold M. Coombs Jr.
ATTORNEY FOR Respondent.

SWORN TO BEFORE ME THIS 14th DAY OF June, 1985.

Karen B. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86.

QUESTION PRESENTED

I.

Since the South Carolina Supreme Court applied the applicable law and afforded Petitioner the right to introduce relevant evidence in mitigation of the capital offense, is there now reason for the Court to issue the Writ of Certiorari?

INDEX

Cases Involved	iii
Opinion Below	1
Jurisdiction	1
Question Presented	1
Argument	1
Conclusion	7

CASES INVOLVED

Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090, 1107 (1983) ---------- 4

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982) ---------- 4

Lockett v. Ohio, 438 U.S. 586, 604 (1978) ---------- 2, 4, 5

Raulerson v. Wainwright, 732 F.2d 803, 806-808 (11th Cir. 1984) ---------- 5

Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983) ---------- 5

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) ---- 2, 4

State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1944) 2

State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) - 3, 4

State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985), cert. denied, U.S.S.Ct. April 15, 1985 ---------- 2, 3, 4

State v. Lucas, S.C. Supreme Court Op. No. 22224, January 29, 1985, cert. denied, U.S.S.Ct. June 10, 1985 ---- 2

State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984) - 4

State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984) -- 4

State v. Plemmons, S.C. Supreme Court Op. No. 22338, June 3, 1985 ---------- 2, 4

State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985) ---- 1, 4

State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984) --- 2, 4, 5

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985) and is reproduced in Petitioner's Appendix at pages A-1 - A-55.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Since the South Carolina Supreme Court applied the applicable law and afforded Petitioner the right to introduce relevant evidence in mitigation of the capital offense, is there now reason for the Court to issue the Writ of Certiorari?

ARGUMENT

I.

The South Carolina Supreme Court applied the correct law in affording Petitioner the right to introduce relevant

evidence in mitigation of the capital offense, and there is no reason for the Court to issue the Writ of Certiorari.

Petitioner asserts in essence that the present case is an appropriate occasion for the Court to expressly consider whether Lockett error may be harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. (Pet., pp. 16-17). Petitioner then first suggests that "any attempt to identify whether constitutional error in the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the sentencing verdict is fraught with insurmountable difficulties" (Pet., p. 19, lines 3-7) but Petitioner must necessarily admit "where only genuinely cumulative testimony is excluded, the trial court has not committed any error at all. (Pet., p. 20, lines 8-10). Cumulative evidence is additional evidence of the same kind to the same point. State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1944). And the principle that exclusion of merely cumulative mitigating testimony may be found harmless is recognized by the South Carolina Supreme Court. State v. Plemmons, S.C. Supreme Court Op. No. 22338, June 3, 1985; State v. Elmore, S.C. Supreme Court Op. No. 22322, May 16, 1985; State v. Lucas, S.C. Supreme Court Op. No. 22224, January 29, 1985, cert. denied, U.S.S.Ct. June 10, 1985; State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985), cert. denied, U.S.S.Ct. April 15, 1985. In light of the South Carolina Supreme Court's ruling in State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984) that the exclusion of relevant character evidence (testimony of jail and stockade officers concerning defendant's past behavior in prison) offered in mitigation is reversible error, Petitioner now asks the Court to grant

the Writ merely to challenge the determination by the South Carolina Supreme Court that Petitioner was duly afforded the opportunity to introduce evidence of his past adaptability to prison life by his own testimony and through the testimony of other witnesses.

Petitioner also argues that predictions of future adaptability to prison life should be admissible into evidence. This view is without merit. "A jury needs to know how a given defendant came to commit a given aggravated murder to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty." State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). A defendant's future adaptability or conformity to prison life is irrelevant. Id.; State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982); State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985), cert. denied, U.S.S.Ct. April 15, 1985. Petitioner advances no convincing argument or authority as to why one's continuing enjoyment of life should be contingent upon his future adaptability to prison. Regardless of whether the future adjustment is good or poor the defendant would still be alive, and the continuance of his life in light of his commission of a particular crime is the question before the jury. The jury is simply not being called upon in a capital sentencing proceeding to choose an ordinary citizen who they feel will be a well-adjusted productive prisoner.

The Supreme Court of South Carolina has repeatedly asserted the right of the accused and State to present to the jury during the sentencing phase of a capital case relevant information concerning the person on trial for his life. "In the sentencing phase of a capital case it is

essential that the jury have for consideration all pertinent information about the defendant on trial for his life." State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), citing, Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090, 1107 (1983); accord, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). "The United States Supreme Court held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), 'the sentencer, in all but the rarest kind of capital case [should] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985). This, of course, includes the testimony of jail and prison officials concerning a defendant's behavior since his arrest offered to show the defendant's character. State v. Plemmons, S.C. Supreme Court Op. No. 22338, June 3, 1985; Koon, 328 S.E.2d at 626; State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984). Any statutory or non-statutory mitigating circumstances may be considered by the jury in arriving at their sentence. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), citing, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) the South Carolina Supreme Court stated:

> The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. [citation omitted]. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), cited as controlling in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982),

> the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense.

The traditional authority of the trial court to exercise its sound discretion in determining the relevancy and admissibility of proffered testimony is not superseded by the defendant's right to present evidence in mitigation relating to his character, record, and the circumstances of the offense. Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983) and Raulerson v. Wainwright, 732 F.2d 803, 806-808 and n. 6 (11th Cir. 1984), citing, Lockett v. Ohio, 438 U.S. 586 (1978).

It is inescapable that the South Carolina Supreme Court presently recognizes and applies the principles upon which Petitioner asks the Court to grant certiorari. In fact, Respondent again notes that the South Carolina Supreme Court has applied these principles and reversed the death sentence in State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984) where relevant mitigating evidence was excluded at trial.

Contrary to Petitioner's assignments of error, an examination of the case demonstrates the admission of testimony concerning both Petitioner's past and future good conduct as a prisoner.

1. Prior to asking his witness (Petitioner's former wife) about future adaptability to prison conditions and making his confusing offer of proof, Petitioner's counsel elicited, without objection, testimony that Petitioner has made a good adjustment to prison life. (App. p. 5, lines 1-4).

2. Petitioner's mother testified that Petitioner had been free of drugs since the date of his arrest. (App. p. 6, lines 23-25).

3. Petitioner testified that prison provided him with education in mechanics which complimented prior experience and training in the field and led him to set a lifetime career objective. (App. p. 1, lines 11-16).

4. Petitioner, a skilled mechanic, believed that he could work in prison at the minimum wage during the course of a life sentence and help his children get a good education. (App. p. 1, line 17-p. 2, line 17).

5. Petitioner, by his own testimony, has made a good adjustment to prison life and wants to do his time and get out of prison. Petitioner likes his jailers; the jailers are good to Petitioner, and Petitioner tries to be good to them. (App. p. 3, line 4-p. 4, line 9).

Since the record demonstrates that Petitioner was able to introduce testimony of past good behavior in prison and, additionally, predict his own future adaptability during a desired life sentence, there was no conceivable error, and the Record does not support Petitioner's assignments of error. The South Carolina Supreme Court applied the correct law to insure that Petitioner was afforded the opportunity to have all relevant evidence in mitigation considered by the jury during the sentencing phase of the capital case. There is no issue presented for the Court's consideration, and the Writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

girls were.

THE COURT: I will permit that question.

A My understanding was they were sisters, and one was fifteen and the other sixteen.

Q You served how much time under the Youthful Offender Act?

A Thirteen months.

Q When you got out, what type work did you do?

A I went to work for Garland's Garage doing mechanic work, diesel and auto.

Q Where did you learn mechanic work?

A My father was a pretty good mechanic. I followed him around and picked it up there. When I went to prison, I went to school, ignitions, batteries, different things. When I got out, that's what I wanted to do all my life. I worked before I was incarcerated as a diesel mechanic trainee.

Q Are you skilled at diesel mechanic work?

A Yes sir.

Q If you receive a life sentence, what would you want to do with your employment skills?

MR. DUNN: Object. If he received a life sentence what he would want to do with his employment skills is not relevant.

THE COURT: I will permit the question.

A Well, like I say, I am a skilled mechanic. I would want

to work.

Q What would you want to do with the money? Why did you form this idea?

A My understanding from Chief Warren Baker (sic) of the South Carolina Supreme Court -- I mean United States Supreme Court, if I am not mistaken, is trying to work out some kind of job situation with people with long terms so they can earn minimum wage and support their family.

Q What would you want to do with the money you earned from this?

A I would like to help my children.

Q What specific ways?

A Like for instance a good education. If not an expensive college, at least technical college or something like Francis Marion or Coastal.

Q How many children do you have?

A I have three.

Q What are their ages, names and ages?

A I have Christopher Brian, he is eight: Amanda Lee, she is five; and Ronald Deray, II, he is two.

Q Where did you work after doing the mechanics work? What other forms of jobs did you have?

A You mean after incarceration?

Q Yes.

A I went to what they call Job Assessment, which is CETA

funds. I took up machine shop, tool and die, technology of tool and die. Later after I graduated the course I went to work for J. and H. Spiff Manufacturing in Lamarr.

Q. By the way, with reference to your adjustment to prison, when you were first incarcerated here in the Horry County jail, did you have any difficulties at first?

A. You always have difficulties when you first get locked up.

Q. Did you make any complaints right at the start?

A. Yes, sir, quite a few.

Q. What specifically did they involve?

A. Well, they locked me up on Saturday night. I was kicking the door because I wanted to make a phone call. I had some cigarettes and they wouldn't let me have them. I had some stuff, like a change of clothes, shampoo. They wouldn't let me have them.

Q. Did your wife come see you?

A. Yes, sir. They wouldn't let her see me. That was to my knowledge.

Q. After that initial period, what has been your adjustment?

A. I learned to live with it.

Q. How do you get along with the jailers?

A. I try to get along the best I can.

Q. What has been your experience with specific jailers?

A. I never had any trouble out of them. I mean everybody

had difficulties, but I like them. I get along with them. They are good to me. I try to be good to them.

Q If you received a life sentence and were in a prison population, what type adjustment do you feel you could make to a life sentence?

A I would want to do my time and get out.

Q When would you expect to get out?

A Twenty years is a life sentence for parole, but there is no guarantee for parole then.

Q After you had worked for a period as a mechanic, where else have you worked?

A I worked for Roper Lawnmower Products in Orangeburg.

Q Doing what?

A Machine shop work.

Q Let me ask you this, on those two offenses that the State has referred to, the one with Miss Norwood and the one in Georgetown County, was anybody ever hospitalized?

A Not to my knowledge, no, sir.

Q In Florence -- How did you meet the person or how did you get with the person in Florence that you were charged with criminal sexual conduct?

A I met her at a restaurant where my former wife was working.

Q Did you make any attempt to conceal your identity?

A No, sir.

Q I believe you all were together how long?

Q Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?

A He has made a good adjustment.

Q What is your opinion as to whether or not he could be---

MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.

THE COURT: Mr. Dusenbury?

MR. DUSENBURY: I think she is well qualified.

THE COURT: Let's hear the rest of your question and then I will decide.

Q What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?

THE COURT: Objection sustained.

MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.

THE COURT: I refer you to the case of State versus Koon. I am familiar with the law. If you would like to put something on the record, you may do so at this time, or you may do so at the next recess.

MR. DUSENBURY: I would like to put it on the record at this time.

THE COURT: Ladies and gentlemen, I would ask you to

A. The two boys, because the girl that divorced him -- I don't know where she lives. I haven't seen the child so I don't know where she lives.

Q. What is his relationship and affectionate situation with regards to the two boys?

A. He would pick his oldest son up on the weekend, His youngest son, when he wasn't working, he would keep little Ronny. When Pam was working, she would keep little Ronny. Ronny had a good relationship with his children.

Q. Other than his father, what is his relationship with his relatives?

A. I never had any problems with Ronny and his relatives. As a matter of fact, Ronny and I never had any problems.

Q. What kind of worker is Ronny when he is not on drugs, and how does he feel about work?

A. Ronny can do a lot of things. Ronny was a carpenter with my father. Most of our nephews are carpenters. He is a carpenter. I sent him to tech. He is a mechanic. He is a diesel mechanic. He worked in tool and die. He went to school for tool and die. He helped my husband now.

Q. That's Mr. Robert Wall?

A. That's correct.

Q. Of course he is -- I will put it this way, is he clean now of drugs since he was arrested November 6, 1982?

A. Yes, sir.